

No. 20135

In the

**United States Court of Appeals
For the Ninth Circuit**

STEWARD GRIFFITH, MERLE GRIFFITH, COLUMBIA
ACOUSTICS, INC., ANNE BUCKNER and GERALD
DAVIS,

Appellants,

vs.

PATRICIA GROVER, Trustee of the Estate of Steward Grif-
fith, Bankrupt,

Appellee.

APPELLANTS' BRIEF

Appeal from the United States District Court for the
Western District of Washington, Southern Division
Honorable George H. Boldt, *Judge*

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JURISDICTION

This is an action to set aside an alleged fraudulent transfer. It was filed in the United States District Court for the Western District of Washington, Southern Division. Plaintiff is Patricia Grover, Trustee in Bankruptcy of the Estate of Steward Griffith, a married man acting in his separate capacity. Defendants-Appellants are Steward Griffith and Merle Griffith, husband and wife, in their separate capacities and as a marital community, Anne Buckner, Gerald Davis, and Columbia Acoustics, Inc., a Washington corporation. Defendant Rolland Henderson has not appealed. The matter in controversy exceeds \$10,000 exclusive of interest and costs (R 6).

After a trial to the court the trial court entered findings and conclusions (R 59) and judgment (R 88) on March 18, 1965 in favor of plaintiff and against defendants and each of them for the sum of \$42,259.89. On April 13, 1965 all defendants except Rolland Henderson appealed from the judgment (R 90).

The District Court had jurisdiction of this case under 11 USC § 107 as amended and 28 USC § 1331 as amended. This Court has jurisdiction under 28 USC § 1291 as amended.

STATEMENT OF THE CASE

This action was brought under Section 67d, (11 USC § 107(d)) (R 2) and 70e, (11 USC 110(e)) (R 4)

of the Bankruptcy Act by plaintiff Patricia Grover, Trustee in Bankruptcy of the Estate of Steward Griffith, a married man, acting in his separate capacity, bankrupt, against defendants, Steward Griffith and Merle Griffith, husband and wife, and the marital community, Gerald Davis, Rolland Henderson, Anne Buckner and Columbia Acoustics, Inc. to recover an alleged fraudulent transfer of the property of the bankrupt.

The bankrupt, Steward Griffith, and his wife were bona fide residents of Washington domiciled at Vancouver, Washington (R 20), and the property involved was found by the court to be community property (Tr 101). The date of bankruptcy is July 11, 1962 (R 21).

The transaction involved was the deposit by Steward Griffith and Merle Griffith, husband and wife, on May 8, 1962 in a bank in Vancouver, Washington, of \$42,259.89 of funds of the marital community withdrawn from another bank in Vancouver, Washington (R 21). From this deposit moneys were loaned to the bankrupt. He used such moneys for payroll and other payments to creditors (R 21, Tr 38), and there remained on deposit at the date of bankruptcy the sum of \$8,057.23 (Exh 3).

Plaintiff sought recovery from all defendants on the theory that they had conspired, aided and abetted the defrauding of the bankrupt's creditors (R 25).

The court entered judgment against defendants Steward Griffith and Merle Griffith, and the marital community, and Gerald Davis, Rolland Henderson, Anne Buckner and Columbia Acoustics, Inc. for the sum of \$42,259.89, costs and disbursements (R 88).

STATEMENT OF FACTS

Defendants Steward Griffith and Merle Griffith were and are husband and wife. They were bona fide residents of the State of Washington domiciled at Vancouver, Washington, since December 14, 1958 (R 20). Steward Griffith operated a business in Portland, Oregon, as a sole trader (R 20) under the trade name of "Steward Griffith Company" until his petition in bankruptcy was filed (R 60).

The court found that the assets of Steward Griffith's Portland business are community property (Tr 101). It was stipulated (R 21) and the court found that the debts of the business are separate liabilities (Tr 101). In December 1961 Steward Griffith and his wife began depositing some of the community property in the Seattle First National Bank, Clark County Branch, Vancouver, Washington, in an account with an assumed name of S & M Enterprises (R 21). S & M represent the first letter of the given names of Steward and Merle Griffith (R 21). Community living expenses were paid from this account (R 21) and loans from these com-

munity funds were made to Steward Griffith Company for payroll and other expenses (R 21).

On May 8, 1962, the marital community caused \$42,259.89 to be transferred from the S & M Enterprises account in the Seattle First National Bank in Vancouver to an account under the name of M. M. Knowles (Merle Griffith's maiden name) in the First Independent Bank in Vancouver, Washington. (R 21) A part of these funds was advanced to the bankrupt and by him paid to his creditors (R 21, Tr 38), and at the date of bankruptcy the sum of \$8,057.23 (Exh 3) remained in the M. M. Knowles account and the sum of \$10,743.72 remained in the S & M Enterprises account (Exh 1).

On July 11, 1962 Steward Griffith filed a petition in bankruptcy in the United States District Court for the Western District of Washington and was adjudicated a bankrupt as a married man acting in his separate capacity (R 21). Neither Merle Griffith nor the marital community is in bankruptcy.

Plaintiff Patricia Grover is the Trustee in Bankruptcy of the Estate of Steward Griffith, a married man acting in his separate capacity (R 21). It was stipulated that all of the creditors in the bankruptcy are separate creditors of Steward Griffith and their claims are limited to his separate property (R 21).

No evidence was produced on the solvency of either

Steward Griffith or Merle Griffith in December 1961. Merle Griffith's solvency or insolvency was of course immaterial, but the court found, without any supporting evidence, that during December 1961 "Steward Griffith and Merle Griffith became insolvent" (R 60-61). At the trial the court erroneously advised Steward Griffith that one is deemed insolvent when "unable to meet its obligations in the ordinary course of business" (Tr 70), rather than "when the present fair salable value of his property is less than the amount required to pay his debts" as provided in Sec 67d(1)(d) of the Bankruptcy Act, 11 USC Sec 107(d)(1)(d), or "when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on existing debts as they become absolute and matured" as provided in RCW 19.40.020. After the court's erroneous instruction on insolvency, Mr. Griffith testified that the Steward Griffith Company was not insolvent in December 1961 (Tr 70). There is no other evidence relating to the bankrupt's insolvency. There was no evidence concerning the fair salable value of his property or of his debts in December 1961 or at any other time. No attempt was made to introduce evidence of the bankrupt's insolvency on May 8, 1962, the date of the challenged bank deposit, or as of any other date.

There was no finding that defendants Gerald Davis, Rolland Henderson, Anne Buckner and Columbia Acous-

tics, Inc. had conspired with, aided or abetted the bankrupt in defrauding his creditors. The court expressly stated:

“Well, I do not find that any parties other than the bankrupt and wife were guilty of conduct amounting to fraud, and not any one of the other parties Defendant will be held chargeable with fraud.” (Tr 105-6)

QUESTIONS PRESENTED

1. Does state law determine the interests of husband and wife in property acquired after marriage?
2. Are the interests of husband and wife in personal property acquired during marriage governed by the law of their domicile?
3. Is the community property here involved subject to the claims of separate creditors of the bankrupt?
4. Was there any evidence of a transfer?
5. Are the findings supported by the evidence?
6. Do the findings support the judgment?

SPECIFICATIONS OF ERROR

1. The court erred in failing to apply the law of Washington to determine the interests of husband and wife in property acquired after marriage, and in failing to hold that the property which it found to be com-

munity property was not subject to the claims of separate creditors of the bankrupt.

The state law of the parties' domicile governs the nature of interests of husband and wife in personal property acquired during marriage. The bankrupt and his wife were domiciled in Washington and under Washington law the property here involved was community property and not subject to the claims of separate creditors of the bankrupt.

2. The court erred

(a) in entering Finding VIII (R 60-61) to the effect that Steward Griffith and Merle Griffith in December, 1961, began depositing substantially all of their assets and funds with banks in Vancouver, Washington; that during December, 1961, Steward Griffith and Merle Griffith became insolvent and that prior to December, 1961, Steward Griffith and Merle Griffith transacted all of their business and financial business with banking institutions located in Portland, Oregon;

(b) In entering Finding IX (R 61) to the effect that Steward Griffith and Merle Griffith formed Columbia Acoustics, Inc. for the purpose of avoiding their creditors and that defendants Rolland Henderson, Gerald Davis and Anne Buckner participated in the formation and operation of Columbia Acoustics, Inc. for their personal benefit;

(c) In entering Finding X (R 61) to the effect that the activities of Steward Griffith and Merle Griffith in depositing funds in Washington were done with intent to frustrate the claims of their Oregon business creditors;

(d) In entering Finding XI (R 61) to the effect that said business claims and liabilities of Steward Griffith and Merle Griffith were incurred for the benefit of Steward Griffith and Merle Griffith and that the assets deposited by Steward Griffith and Merle Griffith are subject to the claims of creditors arising out of the Oregon business;

(e) In entering Finding XII (R 62) to the effect that the deposit and/or transfers of assets of Steward Griffith Company was a deliberate fraud perpetrated by Steward Griffith and Merle Griffith upon their Oregon business creditors ;

(f) In entering Finding V (R 60) to the effect that both Steward Griffith and Merle Griffith knew the nature and extent of the Oregon business and received substantially all of their income therefrom.

There is no evidence to support said findings; said findings relate to actions, assets, liabilities and creditors of the marital community of Steward Griffith and Merle Griffith and are therefore immaterial and irrelevant to this case which involves claims of separate creditors of Steward Griffith.

3. The evidence and findings do not support the judgment.

(a) Findings V, VIII, IX, X, XI and XII relate to actions taken by the marital community and the assets and liabilities of the marital community. They are irrelevant. There is no evidence or findings relating to the actions of the bankrupt, his separate estate or his separate creditors.

(b) There is no evidence or finding that Gerald Davis, Anne Buckner or Columbia Acoustics, Inc. conspired with, aided or abetted the bankrupt in connection with the alleged fraudulent transfer, and the court expressly found that said parties were not guilty of fraud (Tr 105-106).

(c) There is no evidence or finding that any creditor had a provable claim in bankruptcy or that any creditor with a provable claim was defrauded.

SUMMARY OF ARGUMENT

1. State law determines the interests of husband and wife in property acquired after marriage.

2. The interests of husband and wife in personal property acquired during marriage are governed by the law of their domicile.

3. The property here involved was community property and not subject to the claims of separate creditors of the bankrupt.

4. There was no evidence of a transfer; the deposit of money in the bank constitutes neither a transfer nor a fraud.
5. The findings are not supported by the evidence. They are clearly erroneous.
6. The findings do not support the judgment.

ARGUMENT

1. State law determines the interests of husband and wife in property acquired after marriage.

There was no fraudulent transfer if the property would not have passed to the trustee in bankruptcy. Whether this property would have passed to the trustee in bankruptcy is governed by Sec. 70a(5) of the Bankruptcy Act, 11 USC § 110a(5), which vests in the trustee title to property which the bankrupt could have transferred or which might have been levied upon under judicial process against him.

Except where the property is controlled by a federal statute¹ “ ‘Whether property could have been transferred by a bankrupt prior to the filing of the petition or was then subject to levy and sale under judicial process

1. For example: Homestead entry under federal law, desert entry, Indian rights, claim against federal government. See Authorities therefore in f.n. 22, 4 Collier on Bankruptcy p 1034.

against him is generally a matter of local law' [citations omitted]" 4 Collier on Bankruptcy, p 1034, f.n. 22.

All present law is to the effect that state law determines the bankrupt's interest in community property. At 4 Collier on Bankruptcy (14th Ed) 1065 the following appears:

"In connection with the trustee's assertion of title to the bankrupt's interest in a tenancy by the entirety, tenancy in common, joint tenancy or community property, it is again necessary to emphasize that applicable state law determines the nature, extent and effect of these relationships. The general problem then is whether under the pertinent local law the bankrupt's interest in a tenancy by the entirety, community property or the like, could by any means have been transferred or levied upon or seized at the time the petition was filed. * * *"

Neither the Bankruptcy Act nor any other federal statute bears upon whether the bankrupt could have transferred an interest in community property or whether it is subject to levy under judicial process.

"Appropriate state law has been applied to the following matters: * * * what assets of the judgment debtor may be reached by execution; * * *"
7 Moore's Federal Practice (2d Ed) 2418

The Federal Courts have consistently held that whether property could have been transferred or sub-

jected to levy, as described in Section 70a(5) of the Bankruptcy Act, 11 USC § 110(a)5 is a question of state law. *In Re Furness*, 75 F2d 965 (CCA 2, 1935), the court said at page 966:

“Whether property could have been transferred by a bankrupt prior to the filing of the petition or was then subject to levy and sale under judicial process against him is generally a matter of local law. * * *”

In *Re Kearns*, 8 F2d 437 (CCA 4, 1925), the court said at page 437:

“It may be conceded in this case that the title of the trustee in bankruptcy, whatever it may be, takes effect only as of the date of the adjudication in bankruptcy (section 70a, subsec. 5, Bankruptcy Act [Comp. St. § 9654]), and that the ascertainment of just what the estate is, and how the same may be reached by creditors, if at all, is to be determined largely by the state law on the subject. Hence, if an estate by entreties under North Carolina law cannot be subjected to the payment of debts of either tenant during the period of their joint lives, this court would, in administering the bankruptcy law, follow and adopt the construction and interpretation placed by the state upon its own Constitution and laws, as the rule of property within the state.”

In *Re Brown*, 60 F2d 269 (DC WD Ky 1932), the bankrupt contended that certain property did not pass to the trustee in bankruptcy. In that case the court held

that the property involved did pass to the trustee in bankruptcy but Judge Dawson said at page 272:

“While I am firmly convinced that the rule here announced is a correct construction of the statutes which have been referred to, yet if by a settled line of decisions the Kentucky Court of Appeals had construed these statutes differently in the situation here presented, I would be compelled to follow that line of decisions; * * *”

In *Adelman v Centaur Corporation*, 145 F2d 573, (CCA 6, 1944), the court said at page 575:

“The test to be applied under Section 70 of the Bankruptcy Act as to what property passes to a trustee in bankruptcy is whether, at the date of the filing of the petition the property could have been (1) transferred by the bankrupt or (2) levied upon and sold under judicial process against him or otherwise seized, impounded or sequestered. It is clear from the language of the Act that property or property rights of the bankrupt which at the date of bankruptcy are not in any manner transferable by him or leviable at law or subject to sequestration in a proceeding against the bankrupt do not pass to the trustee. The effectiveness of a transfer or an assignment as against the trustee, is to be tested by the standards of applicable state law. * * *”

Collier on Bankruptcy (14th Ed) states unequivocally that the nature of community property is governed by state law. The following appears at 4 Collier on Bankruptcy (14th Ed) 1076:

“* * * The community estate springs entirely from statutory sources, and its nature and extent depend wholly upon the applicable state law. * * *”

The District Court erroneously believed it was free to disregard the state law of property rights because it has been held that the bankruptcy court is not bound by state law on matters covered by federal statute. The District Court relied upon *Local Loan Co v Hunt*, 292 US 234, 78 L Ed 1230, 54 S Ct 695 (1934) (Tr 100-101, R 85), and *Vanston Bondholders Protective Committee v Green*, 329 US 156, 91 L Ed 162, 67 S Ct 237 (1946) (R 86), both of which dealt with an application of a specific federal statute. *Local Loan Co.* involved a determination of the scope of the discharge provisions of Section 17 of the Bankruptcy Act, 11 USC 35 *Vanston Bondholders Protective Committee* dealt with the question of allowability of a claim under Section 63 of the Bankruptcy Act, 11 USC 103.

State law was not controlling in those two cases because there the court was construing the effect of the federal statutes. That is not our case and those cases do not hold or provide the slightest suggestion that a federal court may apply its notion of equitable principles to matters which are governed solely by local law. Here there is no governing federal statute as there was in *Local Loan Co.* and *Vanston Bondholders Protective*

Committee, and the only law which could be applied is state law.

2. The interests of husband and wife in personal property acquired during marriage are governed by the law of their domicile.

Snyder v Stringer, 116 Wash 131, 198 Pac 733 (1921), follows the usual rule that "The law of the domicile controls as to personal property acquired during coverture." There Snyder and his wife were domiciled in Washington. Snyder had a business in Montana and Iowa. He purchased an automobile in Iowa with funds earned by him in his business in Iowa and Montana. The automobile was brought to Washington where it was seized to satisfy a judgment against Snyder on a separate obligation for which the community was not liable.

In support of the seizure it was argued that under the laws of Montana and Iowa the earnings of a husband became his separate property and liable to levy and sale in satisfaction of his individual debts. In holding the automobile not available for satisfaction of the separate debt, the Washington court pointed out that the laws of Montana and Iowa were inapplicable because the situs of personal property is deemed that of the domicile of the owner. The court said:

"We are of the opinion that, for the purpose of

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"We are of the opinion that, for the purpose of

determining by the courts of this state the ownership of this automobile, that is, as to whether it is community or separate property, both spouses being domiciled in this state when the automobile was acquired in the manner we have noticed, the situs of the property, to wit, the automobile, must be deemed to be that of the domicile of respondents, whatever may be said as to its situs for the purpose of determining its liability to seizure and sale, to satisfy the individual debts of respondent Snyder, while it was in Montana or Iowa, by the courts of those states.”
198 Pac 734

The Restatement of the Law of Conflicts of Laws provides in Section 290:

“Interests of one spouse in movables acquired by the other during the marriage are determined by the law of the domicile of the parties when the movables are acquired.”

To the same effect see McKay on Community Property, pp 431-432.

Nothing unusual is presented by the requirement that the court look to the law of a party's domicile to discover the extent of his interests in personal property. The Bankruptcy Act itself commands that the courts give effect to the exemptions allowed the bankrupt by the law of his domiciliary state, Section 6, Bankruptcy Act; 11 USC § 24, although his bankruptcy might be

pending in another state where he had his principal place of business, Sec 2 Bankruptcy Act; 11 USC § 11.

There is so far as we have been able to determine no exception anywhere to the rule that the interests of husband and wife in personal property are governed by the law of the domicile. This Court in *United States v Elfer*, 246 F2d 941, 944 (CA 9, 1957) said:

“As a general rule marital interests in personalty acquired during marriage are governed by the law of the domicile of the parties at the time of acquisition. *Snyder v. Stringer*, 1921, 116 Wash. 131, 198 P. 733; * * *” 246 F2d 944

3. The property here involved was community property and not subject to the claims of separate creditors of the bankrupt.

It is stipulated that the creditors involved are the separate creditors of Steward Griffith and that their claims are limited to his separate estate (R 21).

In Washington

“All property acquired by either of the spouses during coverture is presumptively community property, and the burden is upon the party who contends that it is separate property to prove otherwise.” *Rustad v Rustad*, 61 Wn2d 176, 377 P2d 414, 415 (1963)

No evidence was presented to overcome the presumption that the property involved is community property and the court found² that

“* * * the assets of the Portland business of Mr. Griffith are considered community property * * *”
(Tr 101)

A determination by the trial court on the community character of property is conclusive upon an appellate court unless the finding is successfully challenged on the grounds of insufficient evidence. *Stone v Walsworth*, 115 CA2d 369, 252 P2d 39 (1953). But here respondent acquiesced in the finding and took no appeal.

The question here is whether community property is subject to the claim of a creditor holding a separate obligation of the husband. The Washington Supreme Court has repeatedly held that community property is not subject to claims arising in another state where by the law of that state the debt is a separate obligation.

In *Re Wallace*, 22 F2d 171, (ED SD Wash 1927), Wallace became bankrupt “individually as to his own

2. Where the trial judge's opinion contains a clear understanding of the basis of the decision below, it will be treated as findings of fact. *Hazeltine Corporation v. General Motors Corporation*, 131 F2d 34, 37 (CCA 3, 1942); *Burnham Chemical Co. v. Borax Consolidated*, 170 F2d 569 (CA 9, 1948). Findings “* * * can be incorporated in the court's opinion” 5 Moore's Federal Practice 2657, and when articulated as part of the decision-making are given greater weight on review than when prepared *ex post facto* by counsel. *Roberts v. Ross*, 344 F2d 747 (C A 3, 1965)

separate property and debts, and not as to the community property and debts of himself and Myrtle Wallace, his wife.”

One of Wallace’s creditors took precisely the position urged herein by the trustee. He claimed that cash acquired since the marriage should vest in the trustee for the benefit of the separate creditors of the husband. The court held that the cash acquired after marriage was not subject to the claims of the husband’s separate creditors. At page 173 the court said:

“* * * If the objecting creditor here is correct in his contention, it follows necessarily that by filing the petition in bankruptcy the husband thereby and at that moment passed to the trustee, thereafter to be appointed, the legal title, not to a moiety of the community personal property, but to all of it, and by that act subjected the whole of it to the satisfaction of the petitioner’s separate debts, to the utter annihilation of the wife’s rights in the property, and to the complete extinguishment of the rights of community creditors, if any such there be.

* * * * *

“Clearly under the petition in this case the bankrupt has not, in the exercise of his discretion, voluntarily assented to the subjection of the community personalty to the payment of his separate debts. He expressly does the precise contrary. Moreover, even though the petitioner had actually intended to subject the community personal property to the satisfaction of his separate debts, how could such an attempt be said to be an act of agency performed in the interest of the community? Such an attempt on his part would have been a palpable fraud upon the rights of the wife, and would not be countenanced

or tolerated. 'It is one of the fundamental postulates of the community property system that the husband must not convey or transfer the community assets with intent to defraud the wife; *that is, with intent to deprive her of any part of her share.*' McKay, Community Property (2d Ed) § 721." 22 F2d 173

In *Achilles v Hoopes*, 40 Wn2d 664, 245 P2d 1005 (1952), defendants, husband and wife, were domiciled in Washington. The defendant husband incurred a separate liability on a promissory note in Oregon. The court held:

"Recovery cannot be had against the community for the separate obligation of one spouse." (245 P2d 1006)

In *Mountain v Price*, 20 Wn2d 129, 146 P2d 327 (1944), a Washington husband incurred a separate liability in Oregon. Although the liability would have been a community obligation in Washington, Oregon law governed as to the nature of the liability and the community property was held not affected by the separate liability of the defendant husband.

Collier states that the community property is not subject to the claims of creditors of one spouse:

"* * * where the wife has been adjudged bankrupt, it has been held that the community property does not pass to the trustee, nor may the wife's trus-

tee compel a division of the property so as to subject her interest to the payment of her debts. * * *” 4 Collier on Bankruptcy (14th Ed) 1079

On the specific problem presented in this case Collier says:

“A further problem arises where a petition in bankruptcy is filed by a husband ‘individually as to his own separate property and debts, and not as to the community property and debts of himself and his wife.’ It has been held that in such a case the community property does not pass to the husband’s trustee in bankruptcy. * * *” 4 Collier on Bankruptcy (14th Ed) 1080

4. There was no evidence of any “transfer” and it is no fraud to deposit money in the bank.

A transfer is defined by Section 1(30) of the Bankruptcy Act as:

“‘Transfer’ shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor;” 11 USC § 1(30)

It was stipulated in this case that on May 8, 1962 the bankrupt and his wife had on deposit in Seattle First National Bank in Vancouver, Washington, the sum of \$42,259.89 and that on that date they withdrew that sum from their account at Seattle First National Bank and deposited it in their account at First Independent Bank, Vancouver, Washington (R 21). The court found these funds to be community property (Tr 101). Reference to the sum of \$42,259.89 is found only in connection with the deposit on May 8, 1962.³ If that transaction is claimed to be the "transfer", it fails to qualify as a "transfer" for these reasons:

(1) The funds were not the property of the bankrupt—they were the property of the marital community.

(2) There was no "disposing of or of parting with"⁴ the property—the rights and estate in said property remained exactly the same after May 8 as they had been before.

(3) The bankrupt's estate was in no way diminished by the deposit in the First Independent Bank. The bankrupt had no estate in said funds but if he

3. The findings do not state the date of the alleged "transfer", but there is no evidence of any act or transaction involving the sum of \$42,259.89 except the deposit on May 8, 1962.

4. This is the language of the Bankruptcy Act defining a transfer in Sec 1(30) of the Bankruptcy Act, 11 USC § 1 (30).

had it would not be affected by the deposit in a bank.

5. The findings are not supported by evidence, are clearly erroneous and in any event do not support the judgment.

(1) The court found that the property here involved was community property (Tr 101). The only finding relating to the alleged "transfer" is that Steward Griffith and Merle Griffith in December, 1961 "began depositing substantially all of their assets and funds with banking institutions in Vancouver * * *" (R 61). There is no evidence that these deposits encompassed "substantially all of the assets and funds" of these parties, but in any event the deposit of funds of the marital community does not involve any transfer of the bankrupt's property nor does such a finding support a judgment for a fraudulent transfer of the bankrupt's property.

(2) There are no findings which would make applicable Sections 67d(2)(a), (b) or (c) of the Bankruptcy Act 11 USC 107(d)(2)(a)-(c) inclusive or RCW 19.40.040, 19.40.050, 19.40.060 (i.e. insolvency, unreasonably small capital, or intention to incur debts beyond ability to pay as they mature).

A person is insolvent under the state statute "when the present fair salable value of his assets is less than

the amount that will be required to pay his probable liability on existing debts as they become absolute and matured," RCW 19.40.020, but is insolvent under the Bankruptcy Act "when the present fair salable value of his property is less than the amount required to pay his debts; * * *" Sec 67d(1)(d) Bankruptcy Act; 11 USC § 107(d)1(d).

There is neither evidence nor finding of either type of insolvency of the bankrupt. The court did find that Steward Griffith and Merle Griffith became insolvent in December, 1961 but the finding of insolvency of the marital community (R 61) is of course immaterial. The finding is unsupported by any evidence and is clearly erroneous.⁵

(3) Sections 67d(2)(d) of the Bankruptcy Act, 11 USC § 107(d)(2)(d) and RCW 19.40.070, involving actual intent to hinder, delay or defraud creditors are inapplicable.

There is no finding that any act of the bankrupt defrauded any of his creditors. There are only two findings relating to this point. One is that the activities of Steward Griffith and Merle Griffith (the marital community) in connection with the deposit of \$42,259.89 (community property) were done "with deliberate intent to frustrate the bona fide claims of *their*

5. We direct appellee's attention to Rule 18 of this Court requiring that references be made to the record showing where evidence may be found to support a challenged finding.

Oregon business creditors” (emphasis supplied) (Finding X, R 61). The intent to frustrate claims of creditors of the community is of course immaterial since it is only Steward Griffith’s creditors who are here involved (R 21). There is no evidence of frustration of the claims of *their* creditors by Steward Griffith and Merle Griffith, but if there were it would be simply irrelevant. Also immaterial is mere intent if no defrauding results. Here there is no allegation, evidence or finding that any creditor with a provable claim⁶ was defrauded. The finding that the property involved was community property precludes the possibility of defrauding separate creditors by the transfer of such property.

The second finding relating to fraud is that the deposits were “a deliberate fraud perpetrated by Steward Griffith and Merle Griffith upon *their* Oregon business creditors” (Finding XII, R 62) (emphasis supplied). Again, the finding relates to the creditors of the community, but it is stipulated that only the claims of separate creditors of Steward Griffith are involved in this bankruptcy. This finding is irrelevant and there is no finding relating to the actions of Steward Griffith, the bankrupt, or of any effect upon the creditors of the bankrupt. The application of RCW 19.40.070 is of course governed by Washington law which clearly provides

6. “Before a transfer or obligation is ‘null and void’ it must be fraudulent, under the terms of paragraphs (2), (3), and (4) of § 67d, against creditors of the debtor-transferor ‘having claims provable under this Act’ * * *”. 4 Collier on Bankruptcy (14th Ed) 415; 11 USC § 107(d)(6)

that community property is not applicable to the claims of separate creditors of the husband. See argument under Point 3, *supra*, p 17.

(4) There is no evidence or finding to support a judgment in the amount of \$42,259.89. That sum was deposited by the marital community in a bank in Vancouver, Washington, on May 8, 1962 under Mrs. Griffith's maiden name, M. M. Knowles (R 21). Other moneys remained on deposit in the S & M Enterprises account and some of the funds of each account were advanced to the bankrupt and by him paid to creditors (Tr 38). There remained in the M. M. Knowles account \$8,057.23 (Exh 3) and in the S & M Enterprises account the sum of \$10,743.72 (Exh 1) at the date of bankruptcy. Had the community released its rights in this property to the Trustee, there would not have been \$42,259.89, but some lesser amount. It is undisputed that some of these funds were prior to bankruptcy advanced to the bankrupt and by him paid to creditors (Tr 38).

(5) The court made no finding that Gerald Davis or Anne Buckner or Columbia Acoustics, Inc. "conspired with, aided and abetted the bankrupt" as contended by appellee (R 25). There is no evidence or finding that said appellants received any part of the property allegedly transferred in fraud of creditors.

The court found expressly that these defendants had not engaged in any fraudulent conduct. At Transcript 105-106 the court said:

“Well, I do not find that any parties other than the bankrupt and wife were guilty of conduct amounting to fraud, and not any one of the other parties Defendant will be held chargeable with fraud.”

For these reasons the findings support no judgment against defendants Gerald Davis, Anne Buckner or Columbia Acoustics, Inc.

(6) There is no finding that any action by Steward Griffith caused any damage to any of his creditors. Findings V, VIII, IX, X, XI and XII describe actions alleged to have been taken by the marital community in regard to creditors of the marital community. These findings are irrelevant to the claim of appellee which is based on the rights of separate creditors of Steward Griffith. It is stipulated that all creditors in this bankruptcy “are separate creditors of the bankrupt and their claims are limited to his separate estate” (R 21). Since there are no findings relating to the separate creditors of Steward Griffith or to his separate estate, the findings do not support the judgment.

CONCLUSION

For the reasons stated, the judgment should be reversed and the complaint dismissed.

Respectfully submitted

McCOLLOCH, DEZENDORF &
SPEARS

HERBERT H. ANDERSON

STANLEY R. LOEB

NED HALL

APPENDIX A

EXHIBITS*

<i>Exhibit No.</i>	<i>Identified</i>	<i>Offered</i>	<i>Received</i>
1	Pretrial Order—R 27	34	35
2	Pretrial Order—R 27	32	34
3	Pretrial Order—R 27		35, 38
4	Pretrial Order—R 27		62
5	Pretrial Order—R 27	47	54
6	Pretrial Order—R 27	48	54
7	24	24	39
8	61	61	62
9	27	No	No
10	Pretrial Order—R 27	No	No
11	28	No	34
12	No	No	No
13	51	51	54
14	31		34
15	31		38
16	37	37	37
17	73		
18	Pretrial Order—R 27	No	No
19	Pretrial Order—R 27	No	No
18(a) 19(a)	These documents were erroneously referred to as Exhibits 18 and 19 (Transcript 79) The documents were not marked as such. They were offered in evidence by plaintiff (Transcript 80) but were not received.		

* References are to transcript pages, except for Record references indicated by "R."

CERTIFICATE

I certify that, in connection with the preparation of the foregoing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney